BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

REX ALAN CROAN Claimant V. **AUSTIN'S BAR & GRILL** Respondent AND **MID CENTURY INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,049,582

ORDER

Claimant requested review of the August 14, 2013 Order for attorney fees entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on December 3, 2013.

APPEARANCES

Claimant appeared pro se. Claimant's former attorney, Christopher R. Smith (Smith), of Kansas City, Missouri, appeared on his own behalf. There were no other appearances.

RECORD AND STIPULATIONS

The Board has considered the June 11, 2013 motion hearing transcript, the June 13, 2013 settlement hearing transcript and exhibits thereto, and the August 13, 2013 motion hearing transcript and exhibits thereto, in addition to the pleadings contained in the administrative file.

ISSUES

This is a dispute over attorney fees and costs. Highly summarized, claimant argues Smith is entitled to nothing, while Smith requests the Board affirm Judge Howard's Order of attorney fees and costs.

The only issue raised is: What fees and costs, if any, is Smith entitled to receive?

FINDINGS OF FACT

Claimant and Eppright Law Office, LLC (Eppright), entered into an attorney fee contract on February 15, 2010, stemming from a March 15, 2009 workplace injury. Smith signed the contract for the firm. The contract granted Eppright 25% of the gross amount recovered in claimant's workers compensation claim, plus expenses, and contained claimant's agreement that any checks would be "made payable to myself and The Eppright Law Office, L.L.C." and further that "Eppright Law Office, L.L.C. shall have a lien on all sums recovered in this case for the percentage charged herein as attorney fees and all litigation expenses incurred in connection with this case."[1]

Smith indicated Eppright ceased operations February 28, 2011. Smith began working for Krigel & Krigel, P.C. (Krigel) on March 1, 2011. Prior to such time, in February 2011, Smith sent claimant a letter requesting he execute a new contract of employment with Krigel. Claimant asserted that on April 2, 2011, he received a second letter from Smith, again asking that claimant sign a new attorney-client contract.[2]

On or about July 29, 2011, Smith obtained a written offer from respondent to settle the claim for $5,580.02. At oral argument, claimant conceded he never received a settlement offer prior to such time. Claimant and Smith discussed the settlement offer, but they had disagreements and their relationship deteriorated thereafter. Claimant advised Smith that he would only consider renewing the contract of employment. Claimant, in fact, never signed a contract of employment with Krigel.

Based on statements of claimant and Smith, it appears their last communication concerning the merits of the claim occurred on July 29, 2011. Smith indicated on page two of his brief that claimant failed and refused to communicate with him after such date. At oral argument, claimant acknowledged he never told Smith that he was no longer his attorney, but he believed Smith was no longer his attorney after their July 29, 2011 conversation because a new contract was never executed.

When addressing his impasse with Smith, claimant testified:

> The reason why I terminated counsel or communicated to him that I would not be renewing his counsel when he left the office and went to Krigel & Krigel is because of phone conversations that we had when I, after a year and a half, was getting nowhere on my case. And so I called him and followed up with him and then it kind of deteriorated from there because of comments that he had made to me, one of them stating teeth are not covered in the state of Kansas. And then when I read him the statute that I received after consulting with the State and getting just some information from them, his comment was, maybe you should get your legal advice from an attorney.

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[1] M.H. Trans. (Aug. 13, 2013), Cl. Ex. 1 at 3.

[2] Claimant's Brief at 1 (filed Sept. 27, 2013).

> And he also stated to me that mileage would not be covered, which the statute does state any mileage over five miles is covered. And when I questioned him why he was stating that my dental bills would not be covered, it was submitted to him from Dr. Nielson, my dentist, on June 7th, 2010, and he even states that, quote, unquote, these injuries are consistent with this type of trauma and related to my injury on the job, he still is claiming fees and stating that he represented me. But on the three times this was set for a preliminary hearing,[3] Mr. Smith did not show, and I do have all three of those right there. And then he also stated that he would do no more on my case since I would not return his confirmation to continue representation when he went to another firm.[4]

Claimant never contacted Smith concerning his whereabouts after he did not appear for the hearings. Smith did not know if he was sent notice of the Prehearing Settlement Conferences[5] and doubted he would simply ignore scheduled hearings. Regarding claimant's accusations, Smith succinctly stated, "I disagree with Mr. Croan's recitation of our communications, and that's it."[6]

On April 9, 2012, Smith, on behalf of Krigel, and Elaine Eppright on behalf of Eppright, filed a Motion to Withdraw and Notice of Attorney's Lien in the amount of $1,746.44. They actually claimed *liens* totaling $1,746.44, which represented 25% of the prior offer ($5,580.02 x 25% ≈ $1,395), plus expenses ($351.44) incurred by Eppright.[7] While Smith's and claimant's attorney-client relationship, if it still existed, was irrevocably broken in late-July 2011, the record does not explain why it took until early-April 2012 for the filing of the motion to withdraw.

According to claimant: (1) he sent a settlement demand to respondent's counsel on July 12, 2012; (2) he received a letter from respondent's counsel on April 26, 2013, rejecting his offer and making a counter-offer; and (3) on May 19, 2013, after multiple phone conversations with respondent's counsel, he received a letter confirming a settlement and corresponding hearing set for June 13, 2013.[8]

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[3] These hearings were actually prehearing settlement conferences set by respondent for April 16, 2012, May 21, 2012 and August 27, 2012. See M.H. Trans. (Aug. 13, 2013) at 8-9. The administrative file contains no documentation as to what may have transpired at such hearings.

[4] M.H. Trans. (Aug. 13, 2013) at 7-8.

[5] The file contains two notices of Prehearing Settlement Conferences indicating they were mailed to Smith based on certificates of mailing signed by respondent's counsel.

[6] M.H. Trans. (Aug. 13, 2013) at 9.

[7] M.H. Trans. (Aug. 13, 2013), Cl. Ex. 1 at 6 (which is also Ex. D to the Motion to Withdraw and Notice of Attorney's Lien).

[8] Claimant's Brief at 1-2 (filed Sept. 27, 2013).

Smith sent a May 16, 2013 letter and an enclosed Notice of Hearing regarding his motion to withdraw to Judge Howard, claimant and respondent's counsel. Eppright was not sent a copy of the notice.

The hearing on the motion to withdraw was held June 11, 2013. At oral argument, Smith noted it took a while to schedule the hearing due to scheduling conflicts with respondent's counsel.[9] After the hearing, Judge Howard issued a June 12, 2013 Order allowing Smith to withdraw. The Board does not consider such order to also pertain to Eppright; the order only referenced Smith as being claimant's attorney. The order was not sent to Eppright.

The very next day, June 13, 2013, claimant and respondent settled the claim for a lump sum payment of $14,551.45, with the value of the attorney's lien to be determined. Smith appeared at the hearing to protect his attorney lien.

Just subsequent to the settlement, respondent's counsel filed a Motion for Determination of Attorney Lien on June 14, 2013. Such motion asserted Smith's representation of claimant terminated on or about April 5, 2012, when Smith and/or his law firm filed a motion to withdraw. Eppright was not provided a copy of this motion.

The hearing concerning attorney fees was scheduled by respondent's counsel and held on August 13, 2013. Eppright was not advised as to the hearing.[10] Judge Howard noted claimant was paid $10,913.59 and respondent, based on the attorney fee dispute, had withheld the remaining $3,637.86 of the total settlement. Judge Howard noted Smith was claiming a lien of $1,746.44 for 25% of the original $5,580.02 offer, plus expenses of $351.44. If based on an hourly rate, Smith wanted his hours billed at $220 per hour and paralegal time billed at $95 per hour.

Judge Howard determined that $150 per hour for attorney work and $50 per hour for paralegal work were reasonable hourly rates. Judge Howard found Smith was entitled to reimbursement of actual expenses in the amount of $351.44, as well as attorney fees in the amount of $1,463.94 for 5.95 hours of attorney work at the rate of $150 per hour and 4.4 hours of paralegal work at the rate of $50 per hour.

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[9] While scheduling conflicts are inevitable, a nearly two-year delay after the breakdown of Smith's and claimant's attorney-client relationship, if any, and a hearing on the motion to withdraw, is unacceptable.

[10] While Eppright may be closed for business, the Board is uncertain if it is still a bona fide legal entity and possibly still receiving attorney fees. Elaine Eppright signed the Motion to Withdraw and Notice of Attorney's Lien, on behalf of the firm, in April 2012, subsequent to the date Smith indicates Eppright ceased operations.

PRINCIPLES OF LAW

K.S.A. 44-536 states:

(a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in K.S.A. 44-510c, and amendments thereto.

(b) All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents, which shall be subject to approval by the director in accordance with this section. Every attorney, whether the disposition of the original claim is by agreement, settlement, award, judgment or otherwise, shall file the attorney contract with the director for review in accordance with this section. The director shall review each such contract and the fees claimed thereunder as provided in this section and shall approve such contract and fees only if both are in accordance with all provisions of this section. Any claims for attorney fees not in excess of the limits provided in this section and approved by the director shall be enforceable as a lien on the compensation due or to become due. The director shall specifically and individually review each claim of an attorney for services rendered under the workers compensation act in each case of a settlement agreement under K.S.A. 44-521, and amendments thereto or a lump-sum payment under K.S.A. 44-531, and amendments thereto as to the reasonableness thereof. In reviewing the reasonableness of such claims for attorney fees, the director shall consider the other provisions of this section and the following:

(1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney; the employer shall attach to the settlement worksheet copies of any written offers of settlement which were sent to the employee before the employer was aware that the employee had hired an attorney;

(2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

(3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;

> (4) the fee customarily charged in the locality for similar legal services;
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> (5) the amount of compensation involved and the results obtained;
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> (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
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> (7) the nature and length of the professional relationship with the employee or the employee's dependents; and
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> (8) the experience, reputation and ability of the attorney or attorneys performing the services.
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> (h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.
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> (i) After reasonable notice and hearing before the administrative law judge, any attorney found to be in violation of any provision of this section shall be required to make restitution of any excess fees charged.

While a client may discharge an attorney at any time, the client cannot simply rid himself of the attorney-client contract.[11] "Generally, an attorney who is discharged before the occurrence of the contingency provided for in a contingency fee contract may not recover compensation on the basis of the contract, but rather the attorney is entitled only to the reasonable value of the services rendered based upon quantum meruit."[12]

When work is performed by an attorney-agent of a firm, the firm is entitled to the compensation earned during such attorney's employment with the firm.[13]

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[11] See *Bryant v. El Dorado Nat. Bank*, 189 Kan. 486, 490, 370 P.2d 85 (1962) and *Carter v. Dunham*, 104 Kan. 59, 177 P. 533 (1919).

[12] *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 904, 220 P.3d 333 (2009); see also *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 579, 663 P.2d 663 (1983).

[13] See *Shamberg,* 289 Kan. at 908-09; see also *Cox v. Trousdale*, 138 Kan. 633, 643, 27 P.2d 298 (1933) ("[I]t is elementary law that, in the absence of a special arrangement, a client who employs a member of a law firm employs the firm . . . and the compensation for the services performed pursuant to such employment is due to the firm.").

ANALYSIS

While claimant has not specifically challenged the hours Smith and his paralegals worked on the case, claimant's overarching contention is that Smith was not representing him, but was rather mainly interested in protecting his lien.

The contingency provided for in the contingency fee contract, namely recovery of benefits, had not occurred at the time Smith was allowed to withdraw from representation. As a result, any compensation for attorney services which might be recoverable would need to be based on the reasonable value of such services in quantum meruit, but not on the basis of the contingency fee contract.

The Board has several concerns that require remanding the Award. First, Eppright, an interested firm/attorney who filed a lien, had a statutory right to reasonable notice of the attorney fee hearing and participate in the same, pursuant to K.S.A. 44-536(h).

Second, K.S.A. 44-536(b) only allows an award of attorney fees based on a written contract ("All attorney fees . . . shall be fixed pursuant to a written contract between the attorney and the employee . . . . ").[14] The only written contract is between claimant and Eppright. While Smith signed the contract on behalf of Eppright, he did so as an employee of the firm. The contract was between claimant and Eppright, not claimant and Smith. Smith knew a new contract was needed and unsuccessfully tried to get claimant to sign a contract with Krigel. Because there is no written contract between claimant and Smith, any fee awarded is between claimant and Eppright. An agreement, if any, between Eppright, Krigel and Smith regarding the disposition of the file and potential apportionment of fees or expenses is not in the record.

Third, any fees awarded must be based on "services rendered in connection with the securing of compensation for an employee." Time listed in the Eppright time sheet included 2 attorney hours and 1.5 paralegal hours. Of the time listed in the Krigel documentation of Smith's efforts, 2.5 attorney hours and 0.6 paralegal hours predated his filing a motion to withdraw and assertion of an attorney lien. The lack of a written attorney-client contract between Krigel and claimant precludes a fee based on these efforts. To be blunt, any award of fees must be based on a written contract. Additionally, Smith and his paralegal's 1.45 attorney hours and 2.3 paralegal hours associated with filing a motion to withdraw and protecting an attorney lien were not "services rendered in connection with the securing of compensation for an employee."

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[14] See *Robinson v. City of Wichita Employees' Ret. Bd. of Trustees*, 291 Kan. 266, 280, 241 P.3d 15 (2010) ("[T]he Kansas Act requires the filing of an attorney fee contract with the director of workers compensation and provides that both the contract and the claimed attorney fees must be reviewed and approved.").

Fourth, the expenses listed in the Order were incurred by Eppright, not Smith. Absent some undisclosed agreement between Smith and Eppright regarding costs, Smith cannot be awarded costs incurred by Eppright.

CONCLUSIONS

Having reviewed the entire evidentiary file, the Board remands the August 14, 2013 Order with instructions to schedule and hold a new hearing on the attorney fee dispute, with reasonable notice to all interested parties and attorneys, including Eppright.

AWARD

WHEREFORE, the Board remands Administrative Law Judge Howard's August 14, 2013 Order as noted in the "Analysis" and "Conclusions" sections.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
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